FILED
DEC 14 1982

No. 81-2188

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1981

THE STATE OF MONTANA, et al.,

Petitioners,

v.

NORTHERN CHEYENNE TRIBE OF THE NORTHERN CHEYENNE INDIAN RESERVATION, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE OF THE STATE OF WASHINGTON IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The State of Washington, through its attorney general, files this Brief Amicus Curiae in accordance with Rule 36 of the Court. This brief is submitted as a companion to the Brief Amicus Curiae filed by the State of Washington on July 9, 1982 in *The State of Arizona, et al. v. San Carlos Apache Tribe of Arizona and the Navajo Tribe of Indians, et al.*, No. 81-2147.

I. STATEMENT OF INTEREST OF AMICUS CURIAE

The petition of the State of Montana presents, as a primary issue: whether a "disclaimer clause," contained in either a federal "enabling" act admitting a state to the federal union or in a state's own constitution, bars a state court from determining the validity of claims of Indian reserved water rights in a general adjudication proceeding.[1]

The State of Washington is a "disclaimer" state. In our *San Carlos Apache* Amicus Curiae Brief we detailed an active Washington State general adjudication program, administered over two decades without interruption by jurisdictional challenge, that determined the validity of the Indian water right claims presented by the United States. We further described the injurious cloud placed over Washington State's beneficial ongoing program of state court general adjudications by the Ninth Circuit Court of Appeals' decisions in *Northern Cheyenne Tribe v. Adsit*, 668 F.2d 1080 (9th Cir., February 22, 1982) and *San Carlos Apache Tribe v. Arizona*, 668 F.2d 1093 (9th Cir., February 23, 1982).[2]

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[1] An example of a disclaimer provision is:

> That the people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries of this state, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States.

The quoted provision is a portion of Washington's Constitution, Article XXVI. At least eight other western states have the same or similar provisions — Montana, Arizona, Wyoming, New Mexico, Utah, Idaho, North Dakota, and South Dakota.

[2] The benefits derived from completed general adjudication proceedings were set forth in *Pacific Live Stock Co. v. Lewis*, 241 U.S. 1084, 1096 (1916), as follows:

> It is intended to be universal and to result in a complete ascertainment of all existing rights, to the end, first, that the

II. ARGUMENT

A. The "Disclaimer Clause" Issue

In order to avoid repetition, we summarize the argument set forth in our Brief Amicus Curiae filed in *San Carlos Apache*, *supra*. (Reference is respectfully directed to the expanded views and urgings of the State of Washington contained in that brief.)

Our ultimate plea is that this Court grant Montana's Petition for Writ of Certiorari and, by summary disposition, reverse the decision of the Ninth Circuit in this case as it pertains to the disclaimer issue. This approach is commended based on the clear teachings of *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962) and *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976).[2] The two opinions of this Court, when taken together, support the proposition that the Congress may permit courts of a disclaimer state to exercise jurisdiction over Indian property interests without modification of the wording of either a federal or state disclaimer clause. They further hold, in combination, that, by enactment of the McCarran Amendment — 43 U.S.C. § 666, Congress has authorized the validity of Indian reserved water right claims to be determined in a state court general adjudication proceedings of disclaimer states.

B. The "Wise Judicial Administration" Issue

On the issue of "wise judicial administration," the State of Washington joins in the position set forth by the

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waters may be distributed, under public supervision among the lawful claimants according to their respective rights without needless waste or controversy; second, that the rights of all may be evidenced by appropriate certificates and public records, always readily accessible, and may not be dependent upon the testimony of witnesses, with its recognized infirmities and uncertainties; and, third, that the amount of surplus or unclaimed water, if any, may be ascertained and rendered available to intending appropriators.

[2]See also *Jicarilla Apache Tribe v. United States*, 601 F.2d 1116 (10th Cir., 1979), cert. denied, 444 U.S. 945 (1979).

states of New Mexico, North Dakota, Alaska, Nevada, Utah, and Idaho in their Brief Amicus Curiae filed with this Court in July, 1982. That position is found at pages 8-9 of said brief. The foundation of the position is that, where there are competing federal and state court water right cases, the McCarran Amendment evinces a policy of "avoidance of piecemeal adjudication of water rights" that favors a processing of a state court general adjudication proceeding. *Colorado River Water Conservation District, supra*, 819.

CONCLUSION

The State of Washington urges the granting of the petition for writ of certiorari of the State of Montana.

DATED: August 13, 1982.

Respectfully submitted,

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